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No. 48

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

LOUIS SHOMBERG, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 8-13) is reported at 115 F. Supp. 336.

The opinions of the Court of Appeals for the Second Circuit (R. 14-21) are reported at 210 F. 2d 82.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1954 (R. 21-22). The petition for a writ of

certiorari was filed on April 24, 1954, and was granted on October 14, 1954 (R. 23). The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does the savings clause in Section 405(a) or the savings clause in Section 405(b) of the Immigration and Nationality Act of 1952 govern naturalization proceedings instituted prior to the effective date of that Act and pending at the time the Act took effect?

2. If there is a conflict in the application of Sections 405(a) and 405(b) to a naturalization proceeding pending at the time the Act took effect, does Section 405(a) or 405(b) prevail?

3. Does Section 405(b) authorize the application of Section 318 to naturalization proceedings pending at the time the Act became effective despite the clear prohibition in Section 405(a) that nothing contained in that Act "unless otherwise specifically provided therein" shall be construed to affect such proceedings?

The answers to questions 1-3, *supra*, will provide the answer to the ultimate question in this case, which is:

4. May an alien who filed a petition for naturalization prior to the effective date of the Immigration and Nationality Act of 1952, and who was at that time and is now eligible for citizenship, be deprived of a final hearing on his naturalization petition, solely because a deportation proceeding was instituted against him based upon grounds in the 1952 Act which were not a basis for deportation prior to the effective date of that Act and were therefore not in effect at the time his petition for naturalization was filed?

STATUTES INVOLVED

Section 405 of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U.S.C.A. Sec. 1101, footnote, provides in pertinent part:

Sec. 405 (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

Section 318 of the Immigration and Nationality Act of 1952, 66 Stat. 244, 8 U.S.C. Sec. 1429, provides in relevant part as follows:

> * * * Notwithstanding the provisions of section 405 (b), * * * no person shall be naturalized against whom there is outstanding a final finding of deportability

> pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: * * *

Section 329 of the Nationality Act of 1940, as amended by Section 27 of the Internal Security Act of 1950, 64 Stat. 1015, 8 U.S.C. (1946 ed. Supp.) Sec. 729(c), provided in relevant part as follows:

> (c) * * * No person shall be naturalized against whom there is outstanding a final finding of deportability, and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: * * *

Section 241(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U.S.C. Sec. 1251(a)(4), provides in relevant part as follows:

> Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, 8 U.S.C. (1946 ed.) Sec. 155(a), provided in relevant part as follows:

> Any alien * * * who is hereafter sentenced more than once to such a term of imprisonment [of one year or more] because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported

STATEMENT

Petitioner submitted a preliminary application to file a petition for naturalization, Form N-400, to the New York Office of the Immigration and Naturalization Service on or about October 1, 1952. He was thereafter notified to appear with his witnesses for preliminary examination and, following completion of this examination, he filed his petition for naturalization on December 22, 1952 in the United States District Court for the Southern District of New York. An examiner was designated in accordance with applicable regulations and outside investigations of Petitioner's character and qualifications were made (R. 2). At that time, as at present, he was eligible for citizenship (R. 14).

The Immigration and Naturalization Service took none of the usual further steps to bring the petition on for final hearing. Instead, on June 22, 1953—six months and one day after the petition was filed—the Service instituted deportation proceedings against the Petitioner. At the same time that it refused to go forward with the final naturalization hearing, it pursued the deportation proceedings with extreme and unseemly haste: the deportation warrant of arrest was issued on June 22, 1953 (R. 3); served upon Petitioner the following day (R. 3); and the deportation hearing was commenced within twenty-four hours thereafter (R. 3, 6).

On July 28, 1953, Petitioner moved in the naturalization court (the District Court for the Southern District of New York) by an order to show cause for an order directing that his petition for naturalization be brought on for final hearing. That order to show cause also stayed the deportation proceedings (R. 1-2). After argument, the District Court denied Petitioner's motion and vacated the stay (R. 8-13). Appeal was promptly noted to the Court of Appeals for the Second Circuit and the District Judge ordered the deportation hearing stayed pending disposition of the appeal. On January 25, 1954, the Court of Appeals for the

Second Circuit issued its opinions and judgment affirming the decision of the District Court (R. 14-22). Thereafter it stayed the issuance of its mandate pending disposition of the case by this Court, and accordingly the deportation proceeding has remained stayed.

The deportation proceeding instituted against Petitioner is grounded upon Section 241(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U.S.C. Sec. 1251(a)(4), which did not become effective until after his petition for naturalization was filed. The charge in the warrant of arrest was that Petitioner had been twice convicted of crimes involving moral turpitude (R. 8, 15).

Petitioner has not only conceded that he was twice convicted of such crimes, but indeed set this information out, as he was required to do, in his preliminary application to file a petition for naturalization (N-400). His N-400 and his petition for naturalization also show: that Petitioner was born in London, England, in 1895 and lawfully entered the United States for permanent residence in 1903 at New York City at the age of eight; that since the time of his entry, Petitioner has never departed from the United States; that in 1913, when he was seventeen years of age, and in 1915, when he was nineteen years of age, Petitioner was convicted of crimes involving moral turpitude for which he served terms in penal institutions; and that Petitioner has never been convicted of any other crimes.

At the time Petitioner was convicted—in 1913 and 1915—conviction for crimes was not a ground for deportation. Criminal convictions became a basis for deportation for the first time by Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, 8 U.S.C. (1946 ed.) Sec. 155(a), but even this Act did not render Petitioner deportable since it was expressly limited by its terms as being applicable only to those aliens who were sentenced to imprisonment after its effective date. Because Petitioner's convictions occurred prior to 1917, that statute clearly did not apply to him.

Section 241(a)(4) of the Immigration and Nationality Act of 1952 carried forward from the old Section 19(a)

deportability based upon conviction for crimes. Because the word "hereafter" was omitted from Section 241(a)(4) and because the 1952 Act contains a new section 241(d), 8 U.S.C. Sec. 1251(d), making its provisions applicable to acts which occurred prior to its enactment, the Government has contended that Petitioner has now become amenable to deportation. Accordingly, if Petitioner was ever amenable to deportation, it was only by virtue of Section 241(a)(4) of the 1952 Act,[1] which became effective after his naturalization petition was filed. He was not liable to deportation at the time he filed his naturalization petition, nor at any time before (R. 8, 14).

In view of the broad savings clause contained in Section 405(a) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. Sec. 1101, footnote — which provides that nothing contained in that Act should be construed to affect the validity of a petition for naturalization which was valid at the time the Act took effect, nor to affect any right in the process of acquisition, nor any proceedings pending on the effective date of the Act — Petitioner has contended that deportation proceedings which could be instituted against him *only* under the 1952 Act could not affect his right to a naturalization hearing where his petition for naturalization was filed and pending prior to the date the 1952 Act became effective.

The Immigration Service has argued that the priority provision contained in Section 318 of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1429 — which establishes a priority for deportation proceedings over naturalization proceedings and which prohibits a final hearing in naturalization if a deportation proceeding is pending — overrides Section 405(a) in this case and therefore justi-

[1] We do not believe that Section 241(a)(4) was ever intended or expected to apply to aliens in Petitioner's circumstances and it is our position that this provision is inapplicable to Petitioner. We do not press this contention here, however, since the issue is not directly germane to this proceeding.

fies the denial of a final naturalization hearing to Petitioner.

Resolution of these conflicting claims calls for a determination of the relationship between and the meanings of subsections (a) and (b) of Section 405. Subsection (a) by its terms is all inclusive: it provides that nothing contained in the 1952 Act shall be construed to affect valid petitions for naturalization, rights in process of acquisition, or proceedings pending at the time the Act took effect "unless otherwise specifically provided therein." Section 405(b) is a limited savings clause which provides only that any petition for naturalization pending at the time the 1952 Act took effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed, "except as otherwise specifically provided in title III." Section 318—a provision of title III of the 1952 Act—which prohibits final naturalization hearings where deportation proceedings are pending, does not specifically refer to Section 405(a); it does specifically refer to Section 405(b). Thus, Section 318 could be held to bar a final hearing if pending naturalization proceedings are governed by 405(b); but would not bar a final hearing if pending naturalization proceedings are governed by 405(a).

The District Court held that "section 405(b) is *the only* provision of the Immigration and Nationality Act of 1952 which, in pending [naturalization] cases, makes the old act applicable to the proceedings after the filing of the petition." (R. 12) (emphasis added). The Court of Appeals affirmed the ruling of the District Court, and also held that Petitioner's situation fell within Section 405(b) of the Act (R. 17-19). In a separate opinion, Judge Frank indicated that he had "strong doubts" about the construction placed upon these provisions by the Court; but despite these doubts, and "with much hesitation," Judge Frank concurred (R. 19-21).

SUMMARY OF ARGUMENT

I

Section 405(a) of the Immigration and Nationality Act of 1952 is a broad and comprehensive savings clause which provides that nothing contained in that Act should be construed to affect the validity of various matters and things which were valid and pending at the time the Act took effect; and provides that the old law shall continue to govern as to all such matters and things. Expressly mentioned as being within its coverage are petitions for naturalization, existing proceedings, and rights in process of acquisition—all of which apply to Petitioner in this case.

Except for the rulings of the Courts below, we are aware of no decisions which have held that Section 405(a), does not apply to naturalization petitions pending at the time the new Act went into effect. Indeed, many courts have gone further and held that aliens who had filed only the preliminary naturalization papers, but not the petition for naturalization itself, fall within the compass of Section 405(a). These decisions along with the decisions below create, as we have pointed out in our petition for certiorari (p. 16), "an anomaly in the application of the savings clauses to naturalization proceedings" since the protection of Section 405(a) has been accorded candidates for naturalization who have filed only the preliminary papers, but has been denied Petitioner who has done as much as they have—and more.

II

The rulings below that Petitioner did not come within the scope of Section 405(a) were prompted—not by anything contained in that provision—but because of two other sections of the Act: Section 405(b), which is a limited savings clause applicable only to naturalization proceedings; and Section 318, which prohibits a final naturalization hearing to a petitioner against whom deportation proceedings are pending, and which refers to Section 405(b).

In their application to this case, Sections 405(a) and 405(b) appear to bring about contrary results: if 405(a) applies, Petitioner would be entitled to a final naturalization hearing; but if 405(b) applies, a final hearing appears to be barred by Section 318. The Courts below resolved this conflict in favor of 405(b) because they felt, first, that the specific language of 405(b) rather than the general language of 405(a) should prevail in this situation; and second, because to do otherwise would render Section 405(b) redundant and of no effect.

By elevating 405(b) to a position superior to 405(a), the Courts below ignored the language of 405(a) — which, of course, is no more desirable than ignoring the language of 405(b). Moreover, by permitting the narrow and specific rather than the broad and general savings clause to govern, they seem to have reached a result completely contrary to the evident intention of Congress. Both the First and Fourth Circuits, when presented with this choice, resolved the conflict in favor of 405(a) because of its "broad" and "categorical" language, *United States* v. *Menasche*, 240 F. 2d 809, 811; and because the "implication" of Section 405(b) was not strong enough to negative the plain meaning of Section 405(a). *Petition of Pringle*, 122 F. Supp. 90, 92, aff'd. *sub nom. United States* v. *Pringle*, 212 F. 2d 878.

III

Nor does it appear that Section 318 can negate or override Section 405(a). Section 405(a) provides that nothing contained in the 1952 Act shall be construed to affect the validity of a naturalization petition filed or proceeding pending before the Act's effective date "unless otherwise specifically provided therein". Section 318 is, of course, contained in the 1952 Act, but does not specifically provide otherwise with regard to 405(a). Moreover since it mentions only 405(b) as the portion of Section 405 which would become inoperative when it clashes with 318, it discloses a

selective purpose not to refer to 405(a). And other sections of the Act indicate that where it was Congress' purpose to have Section 318 operate against petitions for naturalization filed before the effective date of the Act, it plainly said so and did not rely on mere implication.

The language and background of Section 318 indicate that it is purely a procedural provision neither creating nor restricting substantive rights, but establishing only an order of doing business: naturalization proceedings must await deportation proceedings. Petitioner's substantive rights as to naturalization were created by the laws in effect at the time his naturalization petition was filed, and these laws—under which Petitioner was entitled to a final naturalization hearing—are expressly continued in effect by Section 405(a).

IV

If Section 405(b) does apply in this case, then a careful reading indicates that Section 318 distinguishes between petitioners for naturalization against whom final findings of deportability have been issued and petitioners against whom deportation proceedings are merely pending. This is because Section 318 applies to petitioners against whom final findings of deportability have been issued "notwithstanding the provisions of Section 405(b)"; but makes no exception to the application of 405(b) with respect to petitioners against whom deportation proceedings are pending. And, of course, 405(b) saves prior law for pending naturalization proceedings just as much as 405(a) does in this case—so long as it does not require the application of 318.

The "notwithstanding" clause is new to Section 318 and was not contained in the provision of prior law from which it was taken, Section 329(c) of the Nationality Act of 1940, as amended. When the "notwithstanding" clause was added to the provision, a semicolon was also added separating petitioners with final findings of deportability from those with deportation proceedings pending. There had

been no such differentiation in prior law because there was no possibility of collision between the priority provision which was enacted in 1950 and the savings clauses which came into being in 1940. In the 1952 Act, where collision between the priority provision and the savings clauses was clearly possible, a distinction was made between the two types of petitioners.

V

If the arguments set out in the previous sections of this Brief do not resolve the questions presented in this case, then there is one method by which the three apparently antagonistic provisions may be read harmoniously; and under this construction, Petitioner is entitled to a naturalization hearing.

The present statutory scheme is clear that an alien who filed a naturalization petition subsequent to the effective date of the Act and against whom a deportation proceeding was commenced subsequent to the effective date of the Act, is barred from a final naturalization hearing by Section 318. Likewise, where an alien filed his naturalization petition prior to the effective date of the Act and a deportation proceeding was instituted prior to the effective date of the Act, a final naturalization hearing was barred by Section 329(c) of the Nationality Act of 1940, as amended.

But there is, as the Court below indicated "an interstice" where the naturalization proceedings were commenced under the old law and the deportation proceedings instituted under the new. (See Appendix A, *infra*, p. 38). Within this interstice, a distinction becomes necessary. Some of the deportation proceedings, though commenced under the new Act, are based upon grounds which were in the laws in effect at the time the naturalization petitions were filed, i.e., prior to the 1952 Act. In other cases in this interstice, the deportation proceedings instituted under the new law are based upon grounds available only under the new law and not available under the laws in effect at

the time the petitions were filed. (See Appendix A, *infra*, p. 38).

With regard to those cases where the deportation proceedings were commenced under the new law but on grounds which were also in effect in the old law, nothing contained in the new Act can be said to have affected the naturalization proceedings, for such petitioners were amenable to deportation under the law in effect when their petitions were filed. But with regard to those cases where the deportation proceeding is based upon grounds available only under the 1952 Act, petitioners with naturalization proceedings pending are decidedly affected by something contained in the 1952 Act since they were not amenable to deportation under the law in effect at the time their petitions were filed.

It is to that small group of cases within the interstice—where the deportation proceedings commenced under the 1952 Act could not have been instituted under prior law—that Section 405(a) would appear clearly to apply. The remainder of the group in the interstice—where the deportation proceedings commenced under the 1952 Act could have been commenced under prior law—do not fall within the compass of Section 405(a), but rather within the prohibition of Sections 405(b) and 318. (See Appendix A, *infra*, p. 38).

This is the only construction of these provisions which—in the context of this case—give meaning to all and also carries out the primary purpose of the savings clauses. All other constructions require the negation of one or another of the provisions involved and cause the anomalies and the contradictions so apparent in the decisions below.

ARGUMENT

I

Section 405(a) of the Immigration and Nationality Act of 1952 Applies to Naturalization Petitions Pending at the Time the Act Became Effective, and Prevents Anything in That Act From Affecting Petitioner's Naturalization Petition

The Immigration and Nationality Act of 1952, 66 Stat. 166 *et seq.*, 8 U.S.C. Sections 1101 *et seq.*, which went into effect on December 24, 1952, sought "to bring within one cohesive and comprehensive statute the various laws relating to immigration, naturalization, and nationality." H. R. Rept. No. 1365 (82nd Cong.), p. 27. In addition to codifying the existing laws on the subject, it effected numerous technical and substantive changes. *Id.* at 28. Accordingly, it also provided for the repeal of a great many statutory provisions which it rendered obsolete. *Id.* at 90; Sec. 403, Immigration and Nationality Act of 1952, 8 U.S.C.A. Sec. 1101, footnote.

Since legislation of this nature affects "the fate of millions of human beings in this country and abroad," H. R. Rept. 1365, *supra*, p. 27, and since every variety of proceeding, application, right, and condition which had been accruing or begun under the old laws could be affected by the changes introduced by the new law, savings clauses were enacted to protect these pending matters. Sec. 405, 66 Stat. 280, 8 U.S.C.A. Sec. 1101, footnote. These savings clauses made it plain that, as a general matter, it was the intention of the Congress that the new law should operate prospectively and that rights accruing or accrued under the old law should not be affected.

It is reasonably apparent that these savings clauses were adapted from the savings clauses contained in the Nationality Act of 1940, Sections 347(a) and (b), 54 Stat. 1168, 8 U.S.C. (1946 ed.) Sec. 747(a) and (b). See *Petition of Menasche*, 115 F. Supp. 434, 435-6 (D.P.R.), aff'd. *sub nom. United States v. Menasche*, 210 F. 2d 809 (C.A. 1), cert.

granted, No. 104, O. T. 1954. The main difference between the new savings clauses and the old is that the new provisions are broader. Thus, a comparison of Section 405(a) of the new Act with its predecessor "reveals that the savings clause contained in [the new Act] has been enlarged by the words, among others, of 'any status, condition, right in process of acquisition.'" *In the Matter of D. L.*, A-5634929, 2-5-53, Int. Dec. #435, Board of Immigration Appeals. This enlargement appears to have resulted from Congress' desire to adopt the views of the Court of Appeals of the District of Columbia in *Bertoldi* v. *McGrath*, 178 F. 2d 977, rather than the views of the Court of Appeals for the Second Circuit in *United States ex rel. Abercastari* v. *Cain*, 147 F. 2d 449. See *Petition of Menasche*, *supra*, at 435-6; *In re Jocson*, 117 F. Supp. 528, 530 (D. Haw.).

The meaning and scope of these added words is at the heart of the issue in *United States* v. *Menasche*, No. 104, O. T. 1954, and is involved also in *Petition of Pringle*, 122 F. Supp. 90 (E.D. Va.), aff'd. *sub nom. United States* v. *Pringle*, 212 F. 2d 878 (CA 4); and *In re Jocson*, *supra*. In these cases the question is whether the filing, prior to the effective date of the new Act, of a Declaration of Intention or a Form N-400—which are the documents submitted prior to the filing of the petition for naturalization—accorded to an alien a right in process of acquisition or a status within the protection of Section 405(a). In the instant case, since the Petitioner actually filed a petition for naturalization prior to the effective date of the Act, this issue is not involved; and accordingly, we face squarely the question of whether Section 405(a) applies to naturalization petitions.

It is inconceivable that any question could be raised, when Section 405(a) is read alone, regarding its applicability to a petition for naturalization which was pending

at the time the Immigration and Nationality Act of 1952 became effective.

Certainly the words of the provision clearly so indicate.[2] The provision expressly refers to a petition for naturalization valid at the time the Act took effect, and provides that nothing in the Act should be construed to affect its validity; and also provides that as to such "matters" the old law shall remain in effect. Moreover, since Section 405(a) expressly applies to "any proceedings" brought before the Act took effect, and since the filing of a petition for naturalization commences a "proceeding," *Tutun* v. *United States*, 270 U. S. 568, a filed petition for naturalization falls within the compass of Section 405(a) for this additional reason. And finally, while there may be some question as to whether an alien who has filed only a Declaration of Intention or a Form N-400 acquires a right in process of acquisition, there can be no question that the filing of the petition for naturalization itself brings into being such a right. *Tutun* v. *United States*, *supra*.[3] We think it beyond dispute that Section 405(a) on its face applies to a valid naturalization petition pending when the Act became effec-

[2] Nothing contained in this Act * * * shall be construed to affect the validity of any * * * petition for naturalization * * * which shall be valid at the time this Act shall take effect, or to affect any * * * proceedings * * * brought, or any status, condition, right in process of acquisition, * * * done or existing, at the time this Act shall take effect; but as to all such * * * proceedings, * * * conditions, rights, * * * things * * * matters, the statutes or parts of statutes repealed by this Act are * * * hereby continued in force and effect.

[3] "there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate." 270 U.S. at 578. And see opinion of the Court below, R. 17.

tive; and we know of no case holding otherwise except the decisions below.[4]

II

If Section 405(a) and 405(b) Conflict in Their Application to a Naturalization Petition Filed Prior to the Effective Date of the Act, Section 405(a) Must Prevail If the Primary Purpose of the Savings Clauses Is to be Effectuated

The Courts below concluded that Petitioner's naturalization petition did not fall within the purview of Section 405(a), not because of anything which appears in that provision, but by reading other provisions of the Act. They noted that Section 405(b) also applied to naturalization petitions and they took into account Section 318 which refers to Section 405(b); and by applying these two provisions, held that Section 405(a) did not apply to Petitioner's naturalization petition, or merely ignored Section 405(a) altogether.

The District Court seems to have based its conclusion on the fact that since 405(b) applied only to naturalization petitions, and 405(a) applied to naturalization petitions and other things as well, the broad and general language of 405(a) must give way to the specific and narrow language of 405(b) (R. 12-13).

[4] In *United States* v. *Cunha*, 209 F. 2d 326, at 328-9, where the First Circuit applied 405(b) to a naturalization petition pending before the new Act became effective, there was no need to consider the meaning or application of 405(a), since 405(b) was sufficient to save the petition. When the First Circuit was compelled to consider Section 405(a), it held it applicable to an alien who had filed a declaration of intention. *United States* v. *Menasche*, *supra*; and this would appear to apply *a fortiorari* where the alien has filed the naturalization petition itself.

The Court of Appeals solved the problem by reasoning in reverse. It held that if Petitioner's naturalization petition was saved under Section 405(a), Section 405(b) would be without significance and would be redundant. To avoid this, it concluded that Petitioner came within 405(b); thereby rendering the language in 405(a) without significance, which was the very thing it refused to do to Section 405(b) (R. 17-19).

When this construction was urged upon the Court of Appeals for the First Circuit, it was unequivocally rejected:

> "Subsection (a) of § 405, however, is broad and sweeping in its terms. Indeed it is so comprehensive that subsection (b) seems redundant. See *Shomberg* v. *United States*, decided by the Court of Appeals for the Second Circuit January 25, 1954, 210 F. 2d 82. But however that may be, subsection (a) provides categorically that 'Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity * * * (etc.)' ". *United States* v. *Menasche*, 210 F. 2d at 811.

Similarly, the District Court for the Eastern District of Virginia stated:

> "Although subsection (b) of the savings clauses, supra, does affirmatively declare that the 1940 Act shall govern pending petitions, its implication is not strong enough to negative the equally plain intent of subsection (a) * * * ." *Petition of Poingle*, 122 F. Supp. at 92.

And this reasoning was affirmed by the Court of Appeals for the Fourth Circuit. *United States* v. *Poingle*, 212 F. 2d 878.

The Government has advanced still another reason for taking pending naturalization petitions out of 405(a) and placing them under 405(b). Its rationale hinges upon the phrase "unless otherwise specifically provided therein"

which is contained in 405(a). The contention is that 405(b) is a provision which otherwise specifically provides as to naturalization petitions and accordingly removes these petitions from 405(a).[3] But the difficulty with this position is that there is nothing in 405(b) which *specifically* provides otherwise with regard to 405(a).[4] No mention of 405(a) is made in 405(b); only a reference to title III appears in 405(b). In view of their proximity and relationship, Congress could not have overlooked 405(a) in enacting 405(b); and the fact that 405(b) cross refers to title III discloses that Congress was aware of the need for specific cross references. And it is also plain from other sections of the Act, that when Congress wished to *specifically* provide otherwise, it plainly said so and did not rely on implication. Compare Sections 328(b)(2) and 336(c), 8 U.S.C. Sections 1439(b)(2) and 1447(c); Sections 329(b)(5) and 336(c), 8 U.S.C. Sections 1440(b)(5) and 1447(c); Sections 327(a) and 327(b), 8 U.S.C. Sections 1438(a) and 1438(b); and cf. *United States ex rel. De Luca* v. *O'Rourke*, 213 F. 2d 759, 764-5 (CA 8).

But the fundamental weakness in all of these rationales which hold that 405(b) rather than 405(a) governs, is that they require that the broad, comprehensive and sweeping language of 4 [illegible] 1) give way to the narrow and specific language of 405(b). Certainly a comparison of these provisions makes it manifest that the emphasis of Congress was contrariwise. It seems reasonably clear that Section

[3] Petition for writ of certiorari, No. 104, O.T. 1954, *United States* v. *Menasche*, p. 8. But compare *Petition of Menasche*, *supra*, at 436, where the Government appears to have conceded otherwise.

[4] The predecessor to Section 405(a), Section 347(a) of the Nationality Act of 1940, *supra*, contained the phrase "unless otherwise provided therein"; the word "specifically" was added to the phrase when it was included in 405(a). Such an addition reflects a clear purpose to require a specific provision otherwise, not a vague one.

405(b) is limited to the single purpose of declaring the substantive law of naturalization which is to govern petitions pending at the time the 1952 Act became effective. Cf. *In re Skoglund*, 46 F. Supp. 434, 436 (D. Minn.). Thus Section 405(b) in this case would require the use of the criteria for naturalization set out in Section 310(a) of the Nationality Act of 1940, 8 U.S.C. (1946 ed.) Sec. 710(a) the provision under which the petition was filed—rather than the criteria of Section 319(a) of the 1952 Act, 8 U.S.C. Sec. 1430(a), which superseded it. In this regard, for example, the old law required a residence period of one year, while the new law requires three years of residence. Section 405(b) would continue the one year residence requirement in this case.

The purpose of Section 405(a) is far broader than the limited purpose of 405(b). Section 405(a) is a catch-all savings clause which seeks to prevent any of the defined rights accruing or accrued under the old law either by an alien or by the Government from being disturbed by the new law. Thus Section 405(a), unlike Section 405(b), twice uses the word "affect," in the sense of affecting the "validity" of an action or proceeding or document; and its enumeration of the types of things which it encompasses and therefore saves—"any prosecution, suit, action or proceeding, * * * or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing"—could hardly be more inclusive or broad. It is clear that the purpose of this provision was to save from defeat by changes in the new law any of the enumerated types of matters which were valid under the old law. And it seems reasonably apparent that the draftsmen of Section 405(a) availed themselves of every known applicable word in order to insure that matters *antecedable as well as foreseeable* would fall within the scope of the provision. See *Ex parte Robles-Rubio*, 119 F. Supp. 610, 613-14 (N.D. Calif.). It is for this reason that Section 405(a) has been described as being a savings

clause of "unusual breadth," *Ex parte Robles-Rubio*, *supra*, at 613, containing "strong language", *Heikkila v. Barber*, 216 F. 2d 407, 409 (C.A. 9) (concurring opinion) and the similar provision of the earlier statute was characterized as being "about as broad as language could be" *Bertoldi v. McGrath*, *supra*, at 978; and "the broadest possible language," *United States ex rel. Aberasturi v. Cain*, *supra*, at 452 (dissenting opinion). See also *Petition of Menasche*, *supra*, at 437.

It would be strange indeed for Congress to use the "broadest possible language", to enlarge a provision already characterized as being "as broad as language can be", and expressly to state that there could be no exceptions unless *specifically* so provided—indeed, do all in its power to extend protection to rights accrued at the time the Act became effective; and then at one and the same time prejudice and limit these rights by expecting a vague implication to be drawn from a provision which satisfies none of the requirements it established.

The situation presented in the instant case is one for which the Immigration and Nationality Act of 1952 has apparently made no precise provision. If Petitioner's naturalization petition is held to fall within the scope of Section 405(a), an entirely different result may ensue than if it is held to fall within the scope of Section 405(b) and Section 318. If Congress had foreseen and considered this possibility, it undoubtedly would have made provision for it. But the danger in any comprehensive codification of a complex body of law, is that situations may subsequently arise which the codifiers could not foresee.

It was to prevent just such unforeseen situations from "affecting" rights accrued under the old law, that Section 405(a) was obviously fashioned.[7] Its language is compre-

[7] "The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act would inevitably have unforeseen effects upon preexisting statuses and conditions, and the Congressional desire to avoid such effects in so far as possible." *Ex parte Robles-Rubio*, *supra*, at 613-14

hensive and all embracing; its application is absolute; and it provides expressly that there will be no exceptions to its terms unless specific provision for such exception is made. It is like a broad net into which aliens and the Government can fall if the provisions of the new law should topple them from the perches which they reached under prior law. That net has been strongly laced and widely strung not merely to save the rights and proceedings and matters which Congress knew in advance would be affected, but also—and especially—to save those things which might be disturbed and which Congress may have overlooked.

In this case, where Section 405(a) and 405(b) appear to have conflicting applications, we believe that Section 405(a) must prevail if the primary purpose of the savings clauses is to be effectuated.

III

Since Section 318 of the Immigration and Nationality Act of 1952 Is Merely a Procedural Provision and Does Not "Otherwise Specifically Provide" as to Section 405(a), It Does Not Prevent a Final Hearing on Petitioner's Naturalization Petition

As the District Court has indicated, Section 318 of the Immigration and Nationality Act of 1952, 66 Stat. 244, 8 U.S.C. Sec. 1429, grew out of the fact that in numerous cases, an alien subject to deportation was also eligible for naturalization. This situation sometimes led to a race between the Government and the alien, the Government seeking to effectuate deportation and the alien to obtain naturalization (R. 8-9). In some instances, after the deportation proceeding had commenced, the alien began a naturalization proceeding, and then attempted to use the latter to delay or defeat the former. E.g. *U. S. ex rel. Walther v. District Director*, 175 F. 2d 693, 189 F. 2d 517 (CA 2). This resulted, according to the District Court, in the enactment in 1950 of Section 27 of the Internal Security Act as an amendment to Section 329 of the Nationality Act of 1940,

64 Stat. 1015.[8] This provision, in turn, with minor modification was carried over as Section 318 of the 1952 Act.[9]

On the basis of this recapitulation, the District Court concluded that from the time of "the adoption of the priority provision it is within the power of the Attorney General, by the institution or withholding of deportation, either to stay an alien's naturalization proceedings and deport him or let him proceed to the safe refuge of a certificate of naturalization". (R. 9). This conclusion, however, fails to come to grips with the problem in this case. For, while no one denies that the priority provision gives power to the Attorney General to stay naturalization proceedings by instituting deportation, the question here presented is whether, in view of Section 405(a), he can do so where the naturalization proceeding has been instituted at a time when there was no statute which made the alien amenable to deportation. There is no indication in Section 318 that the Attorney General is authorized to utilize a provision in the new law to stay naturalization proceedings instituted

[8] Section 329 of the Nationality Act of 1940, as amended by Section 27 of the Internal Security Act of 1950, 8 U.S.C. (1946 ed. Supp.) Section 729(c), provides in relevant part as follows:

> (c) * * * No person shall be naturalized against whom there is outstanding a final finding of deportability, and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other act. * * *

[9] The District Court's review is as reasonable as any. The legislative history of the provision is sparse: It seems first to have appeared in S. 1832 (81st Cong.) and the committee report on that bill indicated merely that the section "provides assurance that the removal of subversive aliens shall not be stayed by naturalization proceedings." S. Rept. 2230 (81st Cong.) p. 9. This bill, after passage by the Senate, died in the House. But the provision was resurrected as Section 27 of S. 4037 (81st Cong.) which later became the Internal Security Act of 1950. All subsequent committee reports refer to the provision in its own terms. S. Rept. 2369 (81st Cong.) pp. 15-16; H.R. Rept. 3112 (81st Cong.) pp. 61-62; S. Rept. 1137 (82d Cong.) p. 45; H.R. Rept. 2096 (82d Cong.) p. 129. See also *United States ex rel. Walther* v. *District Director*, *supra*.

and valid under the old law. Indeed, every indication is to the contrary: the Attorney General may stay naturalization proceedings by the institution of deportation only where the deportation can be instituted under the law in effect when the naturalization proceeding was instituted.

The language of Section 318 and its background indicate that it was designed wholly as a procedural, not a substantive provision. It established an order of doing business: naturalization proceedings must await deportation proceedings. It neither creates nor restricts substantive rights. So far as Petitioner's substantive rights are concerned, they were created under the law in effect at the time his petition was filed—the Nationality Act of 1940 and the Immigration Act of 1917—and these are saved by virtue of Section 405(a) of the present law.

Section 405(a), by its terms, declares that "nothing contained in this Act *unless otherwise specifically provided therein*" shall be permitted to affect the validity of a petition for naturalization valid and pending at the time the Act takes effect. Section 318 does not "specifically provide otherwise." Indeed, its specific reference to Section 405(b) and its lack of any reference to Section 405(a) indicates that there was no intention that Section 318 should interfere with the meaning and mandate of Section 405(a).

Judge Frank, concurring below, sets out this position succinctly:

> "Section 318 specifically mentions Sec 405(b) as the sole part of Sec. 405 which is to be inoperative when it clashes with Sec. 318. This reference to clause (b) discloses a selective purpose, *i.e.*, not to refer to Sec. 405(a). Moreover, Sec. 405(a) by its express terms provides, 'Nothing contained in this Act, *unless otherwise specifically provided therein*, shall be construed * * * to affect any * * * right in process of acquisition * * * ; but as to all such * * * rights * * * the statutes or parts of statutes repealed by this Act are, *unless otherwise specifically provided therein*, hereby continued in force and effect * * * .' It would seem, then, that to apply Sec. 318 to 'rights in process of acquisi

> tion' is exactly what both Sections 318 and 405(a) deliberately said we must not do, since such an application not only (1) disregards the explicit and selective reference in Sec. 318 to Sec. 405(b) but also (2), reading Sec. 318 into Sec. 405(a) by mere implication, disregards the words in Sec. 405(a) 'unless specifically provided therein.' It is noteworthy, too, that the phrase 'rights in process of acquisition' in Sec. 405(a) is new; it was not in the savings clause of the 1949 [sic] Act; it thus appears that Congress intended to broaden this savings provision. See *Petition of Menasche*, 115 Fed. Supp. 434, 436." (R. 20).

As further reinforcement of this view, we respectfully direct attention to Section 330(b) of the 1952 Act, 66 Stat. 251-2, 8 U.S.C. Sec. 1441(b). This Section, as Judge Frank noted, "contains striking evidence that, when Congress meant to have Sec. 318 apply retroactively—*i.e.*, to naturalization petitions pending at the time the 1952 Act became effective—Congress plainly said so and did not rely on mere implication." (R. 20-21).

The full text of that provision is set out in the margin.[10]

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[10] Section 330(b) of the Immigration and Nationality Act of 1952, 66 Stat. 251-2, 8 U.S.C. Sec. 1441(b), provides as follows:

> (b) Any person who was excepted from certain requirements of the naturalization laws under section 325 of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, and had filed a petition for naturalization under section 325 of the Nationality Act of 1940, may, if such petition was pending on September 23, 1950, and is still pending on the effective date of this Act, be naturalized upon compliance with the applicable provisions of the naturalization laws in effect upon the date such petition was filed: *Provided*, That any such person shall be subject to the provisions of section 313 and to those provisions of section 318 which relate to the prohibition against the naturalization of a person against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act, or which relate to the prohibition against the final hearing on a petition for naturalization if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act

In essence, the first portion of Section 330(b) is a savings clause for a particular category of aliens whose petitions for naturalization were filed prior to the effective date of the 1952 Act, since it grants to this category the benefits of prior law. The second portion of Section 330(b), by expressly providing that Section 318 shall apply to aliens in this category, makes it clear, however, that any aliens in this category against whom a deportation proceeding is pending or against whom there is outstanding a final finding of deportability, may not have the benefit of the prior law. This provision is graphic illustration that where the draftsmen desired to make Section 318 operate with respect to petitions filed under prior law, they knew precisely how to accomplish their purpose.

The Court below felt that Section 330(b) did not hold the significance which we attach to it because the "draftsman there was faced with a narrow problem, and the impact of all related sections was immediately foreseeable." (R. 19). With deference, we cannot see how this constitutes an answer. By making reference in Section 318 to Section 405(b), the draftsman plainly indicated an awareness of the relationship betwen the savings clauses and Section 318. Not only did he except 318 from the impact of 405(b), but by selecting 405(b), obviously indicated an intention not to except 318 from the impact of 405(a). Certainly, the impact of 405(a) upon 318 was just as visible as the impact of 405(b).

We believe that the interdict of Section 405(a)—that nothing in the 1952 Act can be construed to affect the validity of a petition for naturalization, a proceeding, or a right in process of acquisition—applies directly and clearly to Section 318; since there is nothing in 318 which specifically provides otherwise. Accordingly, since Petitioner was not deportable when his naturalization petition was filed and no warrant was outstanding nor proceeding pending against him, nothing in the 1952 Act—whether 241(a)(4) or 318, or both—can be construed to defeat his right to a final naturalization hearing.

IV

If Section 405(b) Applies in This Case, Then Section 318 Distinguishes Between Petitioners Against Whom Final Findings of Deportability Are Outstanding and Petitioners Against Whom Deportation Proceedings Are Pending. With Respect to the Latter Group, Section 318 Does Not Bar a Final Naturalization Hearing

In Part II, *supra*, we have set forth our contention that in the event that Sections 405(a) and 405(b) conflict in their application to this case, Section 405(a) should prevail. In Part III, *supra*, we have set forth the reasons why we believe that Section 318 does not bar Petitioner's final naturalization hearing. In each instance, we have concluded that Section 405(b) does not control this proceeding.

If the language in Section 405(a) is ignored, however, and Section 405(b) is read along with Section 318, an argument can be made that a final hearing is barred. But this contention, we believe, misreads and misapplies these provisions.

A comparison between Section 318 as it appears in the 1952 Act and its predecessor, Section 329(c) of the Nationality Act of 1940, as amended, reveals that Section 318 differs from the earlier provision in two important respects: it contains a "notwithstanding" clause which the earlier provision did not; and it is punctuated by a semicolon, whereas the earlier provision was divided by a comma.

We believe that the inclusion of the clause beginning with the word "notwithstanding" is clear indication that the draftsmen were aware and had the intention that Section 318 necessarily had to be construed in the light of the savings clauses. For the same reason, the provision of the 1950 Act contained no "notwithstanding" clause because it did not have to be read with any savings clauses, since none were in operation in 1950.

We also believe that the substitution of a semicolon for the comma was made with the purpose of separating that

which precedes the semicolon from that which follows it. Specifically, it is our position that since the "notwithstanding" clause imposes a limited exception on the effect of the savings clauses, the purpose of the semicolon was to separate that part of 318 which was within the savings clauses from that part of 318 which was within the limited exception to the savings clauses.

The relevant portion of Section 318 provides as follows:

> " " " Notwithstanding the provisions of section 405(b), " " " no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; *and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act:*

It is readily apparent that the instant case is governed by the italicized portion of the provision. There has been no final finding of deportability but there is a deportation proceeding pending.

It also seems apparent that the "notwithstanding" clause does not apply to the italicized section of the provision following the semicolon, but rather only to that portion which precedes it. We therefore conclude that Petitioner is governed by the italicized portion of the provision and is fully within the scope of the savings clauses.

The legislative history of Section 318 reinforces this view. The language of Section 318 first came into the law as an amendment to Section 329 of the Nationality Act of 1940, when it was enacted as Section 27 of the Internal Security Act of 1950. This provision, as we have noted, had neither a "notwithstanding" clause nor a semicolon since there were no savings clauses with which to be concerned.

In one of the earliest drafts of what was later to become the Immigration and Nationality Act of 1952, language identical to that of Section 27 of the Internal Se-

urity Act of 1950 was used. There was no "notwithstanding" clause and no semicolon. Section 317, S. 3455 (81st Cong. 2d Sess.) as introduced by Senator McCarran. But when, in a later version, the "notwithstanding" clause was added to the section, the comma appears to have been changed to a semicolon. Section 318, S. 2550 (82nd Cong. 2d Sess.) as reported by Senator McCarran. See also Section 318, Amendment to H.R. 5678, dated May 22, 1952 (82nd Cong. 2d Sess.) (in the Senate of the United States).

What then, it may be asked, is the meaning of the italicized portion of the provision? If it does not apply to Petitioner, to whom does it apply? The answer, we believe, is that it applies only to those petitioners who filed petitions after the 1952 Act became effective and against whom deportation proceedings are pending. As to petitioners who filed petitions prior to the effective date of the 1952 Act and against whom deportation proceedings are pending, the savings clauses bring into effect the prior law, and it becomes necessary to determine whether the deportation proceedings had been instituted under that prior law. "Ordinarily statute establish rules for the future, and they will not be applied retroactively unless that purpose plainly appears." *Brewster* v. *Gage*, 280 U.S. 327, 337. The savings clauses make apparent "a clear intent on the part of Congress that the new act should take effect prospectively." *Bertoldi* v. *McGrath*, *supra*, at 978. In that portion of Section 318 which is applicable to Petitioner, there is no indication that it was intended to apply other than prospectively.

The District Court, in rejecting this construction, indicated that it did not wish to accord the effect to the changed connotation which Petitioner attributes to it because of the "lack of any explanation for a desire of Congress to change the previous statutory scheme" (R. 11). But in the previous statutory scheme—i.e., Section 329(c) of the Nationality Act of 1940, as amended,—there was no savings clause problem to contend with; and in that scheme

the priority provision made no reference to any savings clause and accordingly did not need to distinguish between petitioners against whom deportation proceedings were pending and petitioners against whom final findings of deportability had been issued. In the new priority provision—Section 318 of the 1952 Act—there was a savings clause problem, as the reference to Section 405(b) makes clear; and accordingly the new provision instituted the distinction.

The Court of Appeals indicated that Petitioner's reading of Section 318 "might be justified if there were any indications in the general scheme of the provisions or in the legislative history to lend support." (R. 17). In the absence of such indications, however, the Court below was "not constrained to grant such substantive effect to so minor and ambiguous a punctuational variation." (R. 17). Whether the punctuational variation is "minor" or "ambiguous" depends, of course, on whether it will be given effect or ignored. If it is given effect in this case, it can hardly be denominated "minor", and certainly, it is not "ambiguous." But the main difficulty with the Court's reasoning is that it refused to take the statute as it found it and failed to apply the time-honored rule that "'every act, upon consideration of all the parts thereof together, is the best expositor of itself'." *Pennington* v. *Coxe*, 2 Cranch. 33, 37.

Petitioner recognizes that punctuation alone is not an infallible guide to the construction of statutes, but as this Court has noted: "Punctuation * * * is, however, not without force". *Northern Pacific Ry. Co.* v. *United States*, 227 U.S. 355, 360. In this case, the changed punctuation blends into the statutory scheme and permits superficially antagonistic provisions to be read coherently and harmoniously. In the absence of some better or more harmonious construction, it should be given effect and should not be lightly brushed aside.

V

There Is One Method by Which Sections 405(a) and 405(b) and 318 May Be Construed Harmoniously, and Under This Construction Petitioner Is Entitled to a Final Naturalization Hearing

If the previous sections of the Brief do not resolve the questions presented in this case to the Court's satisfaction, there is one method by which Sections 405(a) and 405(b) and Section 318 may be construed so that all may be given effect.

It would appear established that prior to the effective date of the Immigration and Nationality Act of 1952, an alien who had filed a petition for naturalization under the then existing law, and against whom a deportation proceeding was commenced under the then existing law, would be barred from a final naturalization hearing by virtue of Section 329(c) of the Nationality Act of 1940, as amended. *Banks* v. *United States*, 204 F. 2d 583 (C.A. 5). It also appears settled that an alien who has filed a petition for naturalization under the 1952 Act, and against whom a deportation proceeding was instituted under the 1952 Act, would be barred from a naturalization hearing by virtue of Section 318 of the 1952 Act. *Application of Chin King*, 124 F. Supp. 911 (S.D. N.Y.). See Appendix A, *infra*, p. 38.

The problem arises where the alien has filed his petition for naturalization under prior law and the deportation is instituted under the new law. The Court below termed this an "interstice covering the narrow category of cases where naturalization was commenced under the old law and deportation is attempted under the new". (R. 17). But the Court below failed to note a very important distinction with regard to the narrow category of cases filling this interstice; in some instances the deportation proceeding, though commenced under the new law, is based upon grounds which were also present in the old law; whereas in other instances, the deportation proceeding commenced under the new law could not have been insti-

tuted under the old law because the grounds upon which it is based were not available under the old law. See Appendix A, *infra*, p. 38.

If this distinction is recognized, then a construction of the three statutory provisions involved in this case can be made by which all of the provisions acquire meaning, and all can be read harmoniously.

First, let us examine those cases in the "interstice" where the ground for the deportation proceeding commenced under the new Act was also a ground for deportation under prior law. The aliens in these cases have not—in any real sense—been affected by anything contained in the new Act. They have been affected by a deportation proceeding which was instituted under the new Act, but which *could have been* instituted under the old law if the Attorney General had the inclination or the time to do so. But they have not been affected by anything "contained" in the new Act, for the same provision was in the prior law.[11] Their naturalization hearings, we believe, would properly be barred under Section 318, when read with Section 405(b); and Section 405(a) would not apply. See Appendix A, *infra*, p. 38.

On the other hand, with regard to those cases in the interstice, where the deportation proceeding was commenced under the new Act upon grounds which were not contained in the old law—such as this case—the alien decidedly *is affected* by something "contained" in the new Act. No deportation proceeding could have been commenced against him under the law in effect when his naturalization petition was filed; and it is only by virtue of something contained in the new Act that his naturalization proceeding may be affected. If the language of Section 405(a) is to be given its ordinary significance, this appears

[11] Section 405(a), it should be noted, prohibits anything "contained" in the new Act from affecting the matters commenced under the old; it does not prohibit anything "done" under the new Act from affecting matters commenced under prior law.

to be precisely what it provides shall not occur; and in this limited situation the bar of Sections 318 and 405(b) cannot apply.

The references in Section 318 to warrants of arrest "issued pursuant to the provisions of this or any other Act" underscore this differentiation. Since, as we have noted, the Immigration and Nationality Act of 1952 replaced all existing legislation dealing with immigration and naturalization and repealed all prior legislation on the subject, *supra*, p. 14, any warrant of arrest issued after its effective date is a warrant of arrest issued under the provisions of the 1952 Act. By the same token, any warrant of arrest issued prior to its effective date is a warrant of arrest issued under "any other act." Moreover, every alien who was deportable under earlier laws had not been served with a warrant of arrest prior to the effective date of the 1952 Act. Many such aliens have been served with warrants since the new Act became effective or will be served hereafter; and these warrants have been and will be issued under the 1952 Act. But of critical importance, some will be issued on grounds in existence prior to the 1952 Act and others will be issued on grounds available for the first time under the 1952 Act. Under our view, Section 405 (a) saves a petition for naturalization where the warrant has been issued on new grounds in the 1952 Act and it is only the warrants issued on the prior grounds to which Sections 318 and 405(b) have reference.

This is the only construction which gives effect to Sections 405(a) and 405(b) and 318, and also carries out the primary purpose of the savings clauses. To construe these sections otherwise would be to say that Congress intended to apply the law in effect at the time a petition was filed (i.e., Section 405(a)), and at the same time authorize the negation of that law through the commencement of deportation proceedings on grounds not in effect when the petition was filed (i.e., Section 318). "A construction that creates an inconsistency should be avoided when a rea-

sonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress." *United States* v. *Reamer*, 303 U.S. 540, 547.

The only manner in which Sections 318 and 405(a) and 405(b) can be read to supplement and not to contradict each other within the context of this case is to say that the warrants of arrest issued under the 1952 Act or any other Act must be based on grounds in effect at the time the petition for naturalization was filed. Under this view, a warrant issued pursuant to 241(a)(4) of the 1952 Act for the deportation of the Petitioner would not be of a nature sufficient under the law to bar his naturalization.

The Court below failed to consider this construction although it was properly raised there. The District Court rejected it with the observation:

> "While that might have been an intelligible legislative scheme, Congress used no words to indicate that that was its intention. To read it into the statute would be judicial legislation." (R. 10)

We respectfully disagree that there is any burden upon the Petitioner to demonstrate that this "intelligible scheme" was Congress' "intention." On the contrary, it is a well recognized rule of statutory construction, as we have noted that " every act, upon consideration of all the parts thereof together, is the 'best expositor of itself.'" *Pennington* v. *Coxe*, 2 Cranch, 33, 37. Indeed, in ascertaining the intention of the legislature, this Court has long ago indicated that "the whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together." *Pollard* v. *Bailey*, 20 Wall. 520, 525 e. This Court has also established as "a general rule, without exception, in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act

and the provisions are not necessarily conflicting. All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another * * *" *Bernier* v. *Bernier*, 147 U.S. 242, 246. And also: "'One part of a statute must be so construed by another that the whole may, if possible, stand * * *'; or, as otherwise expressed, that every clause in a statute should have effect, and one portion should not be placed in antagonism to another." *United States* v. *Laudram*, 118 U.S. 81, 85.

The construction which Petitioner urges for harmonization of these apparently antagonistic provisions is the only one which gives meaning to all and also retains the significance of Section 405(a). Contrariwise, the construction adopted by the Courts below results, in practical effect, in the complete negation of Section 405(a). "The process of interpretation * * * misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve." *Markham* v. *Cabell*, 326 U.S. 404, 409.

In rejecting the construction urged by Petitioner, the Court below recognized that its conclusion seemed "harsh" (R. 19), but apparently consoled itself by noting that the interpretation it adopted had "at least the virtue of promoting consistency of treatment of the aliens". (R. 19). We cannot see how harsh treatment is ever a virtue, whether consistent or not. But more important, if the savings clauses indicate anything, they indicate that it was not Congress' intention that on the effective date of the new Act all aliens would be treated consistently or alike, without regard to the statuses or rights which may have inured to them under prior law. Indeed, when the Government argued that a construction of the savings clauses should be avoided "because it would leave the law as to the naturalization of aliens unsettled for many years to come", *United States* v. *Menasche*, *supra*, at 812, the First Circuit replied: "This may be so, but the argument

should be addressed to Congress. The words of the statute lead clearly to the result we have reached." *Ibid.* Chief Judge Magruder, concurring, underscored this reply:

> "It is not apparent to me how our interpretation of the statute will result in 'unsettling' the law relating to naturalization for many years. The only result will be—and this is quite a different thing—that the provisions of the 1940 Act will continue to govern a greater number of cases than the government would like, and that provisions of the 1952 Act will not be fully applicable for a greater period than the government would like. For all we know, the Congress in so providing may have had in mind the equities of a situation like the present, where, at the date the 1952 Act went into effect, the petitioner had arrived almost at the threshold of American citizenship, following faithfully the procedures for acquiring a right to naturalization under the 1940 Act. We are naturally loath to accept the government's contention that the Congress intended to slam the door in the face of such an applicant for citizenship and to make him start all over again." 210 F. 2d at 812.

These observations apply with even greater force here since the instant Petitioner—who has resided in this country for over 50 years—is being threatened not merely with a denial of naturalization, but with deportation. If Shomberg fails to achieve naturalization, he will probably not—like Menasche—be able to "start all over again". Moreover, Shomberg has not only faithfully followed the *preliminary procedures* to accomplish naturalization before the new Act became effective, but had in fact filed his naturalization petition. If Menasche "had arrived almost at the threshold of American citizenship", then Shomberg was almost through the door.

We believe that under these circumstances, this Court should be no less "loath" than the First Circuit "to accept the government's contention that the Congress intended to slam the door in the face of such an applicant for citizenship * * *."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the decision below should be reversed, and Petitioner's motion for an order directing that his petition for naturalization be brought on for final hearing and that the deportation proceedings pending against him be stayed until the adjudication of his petition, should be granted.

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APPENDIX A

Naturalization Proceeding Instituted	Deportation Proceeding Instituted	Naturalization Proceeding
1. Before 1952 Act	Before 1952 Act	Barred by: Section 329(c), Nationality Act of 1940, as amended.
2. After 1952 Act	After 1952 Act	Barred by: Section 318, Im. & Nat. Act of 1952
3. Before 1952 Act	After 1952 Act	
	A. On grounds in effect before 1952 Act	Barred by: Section 318, Im. & Nat. Act of 1952
	B. On ground **not** in effect before 1952 Act	**Saved** by: Section 405(a), Im. & Nat. Act of 1952